Office - Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-1002

IN THE

Supreme Court of the United States

October Term, 1982

CARNATION COMPANY,
Petitioner,

vs.

STATE DIVISION OF HUMAN RIGHTS,
on the complaint of DARYL CLARKE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

VICTOR T. FUZAK
(Counsel of Record)
H. KENNETH SCHROEDER, JR.
ANNE S. SIMET
HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR
1800 One M & T Plaza
Buffalo, New York 14203
(716) 856-4000
and
PAUL ANTHONY BURNHAM, *of Counsel*
Carnation Company
5045 Wilshire Boulevard
Los Angeles, California 90036
Attorneys for Petitioner

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented

1. Where an employer has actually accommodated the religious beliefs of an employee, can the State of New York require more than reasonable accommodations under Section 296.10(c) of Executive Law?

2. If more than reasonable accommodation is required by the State, does such requirement constitute a violation of the Establishment Clause of the First Amendment to the United States Constitution?

3. Does the First Amendment of the United States Constitution require a uniform standard to be applied by all the states in dealing with questions of discrimination based on creed?

4. Is a state court preempted by federal labor law from compelling an employer to accommodate an employee in the observance of his sabbath in a manner inconsistent with a valid collective bargaining agreement?

5. Is the application of the substantial evidence test to the constitutional issue herein a denial of due process of law in that it denied the employer a review concerning the merits of the discrimination claim?

List of Parties

In addition to the parties listed in the caption, Gary Jordan, a Superintendent of Carnation Company, was a party to the proceedings herein. The complaint was dismissed as to him by the Commissioner of New York State Division of Human Rights in his Decision and Order of June 18, 1979. Truck Drivers and Helpers Union Teamsters Local No. 649 was joined as a necessary party during the course of the hearings but no judgment or decree was entered against it.

TABLE OF CONTENTS.

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	3
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	12
I. The First Amendment Issue	13
II. The Federal Labor Law Issue	22
III. The Due Process--Review Issue	26
Conclusion	29
Appendix A—Memorandum Decision of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, July, 1976	31
Appendix B--Memorandum Decision of State of New York, Court of Appeals	34
Appendix C—Decision of the Commissioner of the New York State Division of Human Rights	37
Appendix D—Order of the New York State Human Rights Appeal Board	58
Appendix E—Memorandum Decision of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982	63
Appendix F—Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982	64

Page

Appendix G—Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, Denying Leave to Appeal to the Court of Appeals 66
Appendix H—Order of State of New York, Court of Appeals, Denying Leave to Appeal 68
Appendix I—Statutory Provisions (Executive Law 296.10(a)(b)(c)) 69

TABLE OF AUTHORITIES.

CASES:

American Motors Corp. v. Department of Industry, Labor and Human Relations, 21 FEP Cases 654 (Wis. Ct. App. 1979) 13,14
Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1982) 29
Committee for Public Education and Religion v. Nyquist, 413 U.S. 756 (1973) 19,20,21,22
Connell Construction Co. v. Plumbers and Steam Fitters Local Union No. 100, 421 U.S. 616 (1975) 24
Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976) 13,21,22
Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) 26
Kremer v. Chemical Construction Corp., _____ U.S. _____, 72 L.Ed.2d 262 (1982) 28
Lemon v. Kurtzman, 403 U.S. 602 (1971) 20
Local 24, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, AFL-CIO v. Oliver, 358 U.S. 283 (1959) 24,25

Page

Meek v. Pittenger, 421 U.S. 349 (1975) 20,21
Oneita Mills, Inc. v. NLRB, 375 F.2d 385 (4th Cir. 1967) 25
Rankins v. Commission on Professional Competence, 24 Cal.3d 167, 157 Cal. Reptr. 907, 593 P.2d 852 (1979), *appeal dismissed*, 444 U.S. 986 (1979)..... 14
State Division of Human Rights v. Carnation Co., 42 N.Y.2d 873, 397 N.Y.S.2d 781, 366 N.E.2d 869 (1977)..... 2,10
State Division of Human Rights v. Carnation Co., 57 N.Y.2d 606 (1982) 3
State Division of Human Rights v. Carnation Co., 86 A.D.2d 977, 448 N.Y.S.2d 331 (4th Dep't. 1982).. 1,3
State Division of Human Rights v. Carnation Co., 53 A.D.2d 1053, 385 N.Y.S.2d 888 (4th Dep't. 1976) 2,9,27
State Division of Human Rights v. Columbia University, 39 N.Y.2d 612, 350 N.E.2d 396 (1976), *cert. denied sub nom. Gilinsky v. Columbia University*, 429 U.S. 1096 (1977) 27
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 10,12,13,14,15,16,17,18, 19,23,24,25,26,29

STATUTES:

N.Y. Exec Law §290 20
N.Y. Exec. Law §296.10..... 10,12,13,26
N.Y. Exec. Law §296.10(a) 20,27,29
N.Y. Exec. Law §296.10(c) 20
N.Y. Exec. Law §298..... 26
U.S. Const., Amend. I..... i,11,12,13
U.S. Const., Art. VI, cl. 2 24

IN THE

Supreme Court of the United States

October Term, 1982

No. _____

CARNATION COMPANY,

Petitioner,

vs.

STATE DIVISION OF HUMAN RIGHTS,
on the complaint of DARYL CLARKE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Carnation Company [hereinafter "Carnation"] hereby petitions for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, enabling this Court to review the decision and order in *State Division of Human Rights v. Carnation Company*, 86 A.D.2d 977, 448 N.Y.S.2d 331 (4th Dep't. 1982).

Opinions Below

Initially, a Memorandum Decision of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department in *State Division of Human Rights v. Carnation Co.* was rendered wherein and whereby that court unanimously held that Carnation had reasonably accommodated its employee, Daryl Clarke as to his religious beliefs and as a result dismissed his complaint. This decision is reported at 53 A.D.2d 1053, 385 N.Y.S.2d 888 (4th Dep't. 1976) and is reprinted as Appendix [hereinafter "App."] A to the Petition. An appeal was taken to the New York Court of Appeals by the complainant Daryl Clarke and the New York State Division of Human Rights [hereinafter "NYSDHR"]. The New York Court of Appeals reversed and remanded to the NYSDHR for purposes of having that agency conduct a public hearing to develop a complete record. This decision is reported at 42 N.Y.2d 873, 397 N.Y.S.2d 781, 366 N.E.2d 869 (1977) and is reprinted as App. B. Thereafter a hearing was held by the NYSDHR and a Decision and Order of the Commissioner of the NYSDHR was made on June 18, 1979 wherein and whereby the Commissioner held that Carnation had discriminated against its employee on the basis of his religion but dismissed such charges against Gary Jordan as superintendent of Carnation. This decision of the Commissioner is not officially reported and is reprinted as App. C. An appeal was taken by Carnation from the Decision and Order of the Commissioner to the New York State Human Rights Appeal Board which summarily affirmed the Decision and Order of the Commissioner. This decision is not officially reported and is reprinted as App. D. A second appeal was then taken by Carnation to

the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department and on this second appeal the Appellate Division confirmed the Decision and Order of the Commissioner in a decision dated February 26, 1982 in the case entitled *State Division of Human Rights v. Carnation Co.* This decision is reported at 86 A.D.2d 977, 448 N.Y.S.2d 331 (4th Dep't. 1982) and is reprinted as App. E.

Jurisdiction

The order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department unanimously affirming the June 18, 1979 Decision and Order of the Commissioner of the NYSDHR was entered on February 26, 1982 (App. F). On May 14, 1982, that same court denied without opinion Carnation's motion for leave to appeal to the New York State Court of Appeals (App. G). Carnation then made a direct application for leave to appeal to the New York State Court of Appeals which application was denied without opinion on September 16, 1982. It is officially reported at 57 N.Y.2d 606 (1982) and is reprinted as App. H.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

Statutory Provisions Involved

The statutory provisions involved are reprinted in App. I.

Statement of the Case

Carnation Company maintains a plant in South Dayton, New York, in which it produces canned evaporated milk. It employs an approximate total of twenty-one (21) hourly employees in its "canning" operations which relate to the issue herein, covering two (2) shifts. The hourly employees are covered by a collective bargaining agreement entered into by Carnation with the Truck Drivers and Helpers Teamsters Local Union 649 and were so covered during all of the relevant time periods herein.

The agreement provides in part that the normal workweek will be "five (5) days, Monday through Sunday", consisting of forty (40) hours per week. It further provides that "employees shall receive two (2) days off each week and relief days so far as possible, are to be rotated". This provision is intended to provide all of the employees affected, the opportunity to experience Saturday as a day off in a rotation system.

The Complainant, Daryl Clarke, [hereinafter "Clarke"], began his employment with Carnation on April 8, 1967, and thereafter was within the bargaining unit represented by Local Union No. 649 and covered by the collective bargaining agreement. In May of 1969, in accordance with the collective bargaining agreement, he bid for the job of Labeler Operator Bracket I and was successful. The job of Labeler Operator Bracket I is considered a skilled job and requires job training which was given to Clarke. There are three positions of Labeler Operator Bracket I. There are two shifts of employment and a Labeler Operator is assigned to each shift. The third Labeler Operator is used for relief. The Labeler Operators rotate their shift assignments on a weekly

basis. The established work practice provides that the employee who is assigned to the "early" shift in a given week, shall have Saturday off in that week. This established work practice is further preserved by the collective bargaining agreement under the "Prevailing Practices" clause contained therein. Clarke worked under and in accordance with these established procedures as a Labeler Operator until some time in September, 1971.

Approximately four years and five months after he began his employment, he converted to the religion of a Seventh Day Adventist sometime in September, 1971. As a result of this conversion, he advised Carnation that because of his religious beliefs, he would not work on Saturdays, since he recognized that day as his sabbath which sabbath period begins at sundown Friday and ends at sundown Saturday.

After being so advised by Clarke, Carnation took the initiative in accommodating him in the practice of his religious beliefs by switching his days off with other employees in a manner that was not in keeping with the normal established practice. As a result, a grievance was filed on November 27, 1971, by Frank K. Wilson, a fellow employee, wherein he protested this method of accommodation as being in violation of the "general rule" under the collective bargaining agreement and insisted that Clarke be made to comply with the established system. Since the grievance of Wilson was upheld and, in order to once again accommodate Clarke, Carnation advised him that he would be permitted to enter into a voluntary agreement with his two fellow Labeler Operators, Michael Blair and David E. Clark, wherein and whereby they would agree to work in his place on those Saturdays for which he was scheduled to work.

Because of the extremely perishable nature of the product, it is imperative that production as scheduled take place and, therefore, it is necessary to have a Labeler Operator present for such production. This voluntary arrangement between Clarke and the other two Labeler Operators was effectuated sometime in 1971 and continued in effect until July of 1973.

In July of 1973, Carnation was advised by representatives of Local Union No. 649 that the other two Labeler Operators no longer agreed to work every Saturday and that it would now be necessary for Clarke to work his scheduled Saturdays. Clarke was advised of this in a letter from Carnation dated July 5, 1973. He was further advised that by reason of this development, there were three alternatives which could be applied to the problem, *i.e.*, (1) Clarke could transfer to a Bracket III general labor job with less pay, but without the requirement of Saturday work; (2) terminate his employment, or (3) create a fourth Labeler Operator job and appoint an individual to fill it who would work in that capacity only on Saturdays and then perform work in a lower bracket job the remaining four days of the week, but at the higher rate of pay assigned to a Labeler Operator as required by the collective bargaining agreement. Clarke was advised that the third alternative was not economically feasible and, therefore, would not be implemented.

Thereafter, Clarke advised Carnation by letter dated July 12, 1973, that he would continue to require his sabbath off by reason of his religious convictions. He apparently also requested Local Union No. 649 to intercede in his behalf and was advised by a representative of the organization that he should choose one of the alternatives proposed to him by Carnation.

On or about July 23, 1973, Carnation received written notices from Michael Blair and David E. Clark that they refused to work for Clarke on his scheduled Saturdays. Once again, Carnation attempted to accommodate Clarke by offering him alternative employment in the Labor Classification which did not involve Saturday work. He was also advised that he would suffer no loss of seniority rights or other fringe benefits with the exception of a slight reduction in pay. The job offered in Bracket III was the *only* job available at the time that did not require Saturday work. On or about August 3, 1973, Clarke advised Carnation that he would not work on Saturdays. Thereafter, Clarke accepted Carnation's offer and took the Bracket III job classification. As a Labeler Operator Bracket I, he was earning $3.63 per hour at that time and the Bracket III General Labor position paid $3.13 per hour, a reduction of only fifty cents ($.50) an hour.

In October of 1976, an opening in Bracket II as a Warehouseman occurred and Clarke bid for that job. As a Bracket II job, the hourly rate of pay was twenty-five cents ($.25) an hour less than the Bracket I jobs as established under the collective bargaining agreement. Clarke was awarded the Warehouseman's job and worked in that position from October, 1976, to February 18, 1980. Although the Warehouseman's job is a shift work position, *i.e.*, first and second shift and also involves a regularly scheduled work day on Saturday, Carnation again took the initiative and made arrangements to accommodate Clarke so that he did not have to work after sundown on Fridays and on Saturdays.

In September of 1977, an opening in the position of Labeler Operator occurred and Clarke bid for that posi-

tion knowing that the position required shift and Saturday work as part of the regular, normal schedule of the job. In a further attempt to accommodate Clarke in his bid for the Labeler Operator position, Carnation canvassed its other employees in an effort to determine if Clarke could be accommodated in working this job by having other employees substitute for him during his sabbath when he would normally be scheduled to work that time period. Carnation was advised by Clarke's fellow employees that they would not substitute for Clarke. Thereafter in a further effort to accommodate Clarke, Carnation also held discussions with Clarke's union representatives to determine if the Union had any possible solutions to the problem and the question of accommodation and the Union advised that it did not. Clarke was advised of this and was further advised that there were no other means of reasonably accommodating him in keeping the Labeler Operator job without working the required schedule.

Since Clarke advised Carnation that he would not work the scheduled days of the Labeler Operator's job as they related to his sabbath, the job was then awarded to the next senior employee and Clarke continued in his employment as a Warehouseman, Bracket II until February 18, 1980, at which time he bid for and was awarded the position of Babcock Tester/Relief Person in the laboratory which is a Bracket I job paying the same rate of pay as the position of Labeler Operator and does not require Saturday work. Clarke currently holds this position and has always been employed by Carnation without any loss of time and has never had to work on his sabbath or religious holidays.

On or about October 16, 1973, Clarke filed a verified complaint with the NYSDHR charging Carnation with discrimination based on religion and Carnation filed a verified answer in response. On or about October 25, 1974, the NYSDHR, after investigation, issued a Determination and Order wherein and whereby it found that there was "no probable cause" to believe that Carnation had engaged in or was engaging in the unlawful discriminatory practice complained of and dismissed the complaint.

Clarke appealed the determination of "no probable cause" to the New York State Human Rights Appeal Board on October 30, 1974, which appeal was heard on March 19, 1975. The Appeal Board rendered its Decision and Order on or about January 13, 1976, wherein and whereby it reversed the finding of "no probable cause" and remanded the case to the NYSDHR for a public hearing on the complaint.

The Decision and Order of the Appeal Board was appealed by Carnation to the New York State Supreme Court, Appellate Division, Fourth Judicial Department on February 11, 1976, and on July 12, 1976, that court unanimously annulled the Decision and Order of the Appeal Board holding that there was "substantial evidence that the employer made every reasonable effort to accommodate Clarke and to allow him to continue his employment" and ordered that the original determination of "no probable cause" be reinstated and the complaint be dismissed. *State Division of Human Rights v. Carnation Co.*, 53 A.D.2d 1053, 1054, 385 N.Y.S.2d 888, 890 (4th Dep't. 1976) (App. A).

An appeal was taken by Clarke to the New York Court of Appeals from the Decision and Order of the Appellate

Division, Fourth Department on September 16, 1976, and the Court of Appeals, by way of a Memorandum Decision dated June 7, 1977, reversed the Order of the Appellate Division and remitted the case to that court with directions to remand the case to the NYSDHR for a full evidentiary hearing by reason of the fact that the record was not "sufficiently developed to determine, as a matter of law, whether retaining Clarke in his former position would have resulted in undue economic hardship to the employer." *State Division of Human Rights v. Carnation Co.*, 42 N.Y.2d 873, 874, 397 N.Y.S.2d 781, 782, 366 N.E.2d 869, 870 (1977) (App. B).

An evidentiary hearing was held by the NYSDHR on February 15, 1978, and continued on April 6, April 7, May 18, June 22 and October 19, 1978, at which time Carnation established by substantial evidence the many acts of accommodation set forth above. Carnation also established that to permit Clarke to work as a Labeler Operator and also observe his sabbath would involve more than *de minimus* cost to Carnation in that it would have to create a fourth Labeler Operator job and appoint an individual to fill it who would work in that capacity only on Saturday and then perform work in a lower bracket job the remaining four days, but at the higher rate of pay assigned to a Labeler Operator as required by the collective bargaining agreement. Following the hearing, briefs were filed at which time Carnation argued that *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) was totally dispositive of the accommodation issue herein. The Commissioner of the NYSDHR, however, specifically disagreed (App. C, p. 54) and held on June 18, 1979, that Carnation but not Gary Jordan had discriminated against Clarke in violation of Section 296.10 of the New York Executive Law.

An appeal from the Decision and Order of the Commissioner was taken by Carnation to the Appeal Board on June 28, 1979. Carnation again argued that it had "reasonably accommodated" Clarke and that for the State of New York to require it to do more would not only constitute an unlawful "undue economic hardship" but would result in a violation of the First Amendment of the United States Constitution. Such action would also force it to violate its obligations under the collective bargaining agreement. On February 18, 1981, the Appeal Board summarily affirmed in all respects the Decision and Order of the Commissioner on the ground that the Decision and Order appealed from was supported by substantial evidence (App. D). Thereafter, the NYSDHR invoked the jurisdiction of the Appellate Division, Fourth Department, to enforce the Order of the Commissioner and Carnation filed a Cross Petition to annul and vacate the Order. On or about February 26, 1982, the Appellate Division, Fourth Department, by way of a Memorandum Decision, unanimously sustained the Order of the Commissioner, dismissed the Cross Petition and granted an Order of Enforcement (App. F). As discussed in the Jurisdictional Statement above, leave to appeal to the New York Court of Appeals was first sought from the New York Supreme Court, Appellate Division, Fourth Judicial Department which denied said application on May 14, 1982 (App. G). Thereafter, Carnation made direct application for leave to appeal to the New York Court of Appeals which application was denied on September 16, 1982 (App. H). Carnation now petitions this Court for a writ of certiorari to enable it to review the decision below.

REASONS FOR GRANTING THE WRIT

The decision below raises serious constitutional questions relative to the Establishment Clause of the First Amendment of the United States Constitution by reason of the application of Section 296.10 of the Executive Law of the State of New York. By its application and the mandate required of Carnation, the State of New York will find itself unduly entangled in enforcing the religious beliefs of its citizens, because it has clearly advanced the religious beliefs of some by demanding unreasonable accommodations from others.

Furthermore, a claim of religious discrimination is totally different from the claims of discrimination based on race, sex, national origin, age and disability by reason of the First Amendment. Since First Amendment rights are involved, a uniform national standard is absolutely necessary and required rather than fifty different state standards. Such national standard, which encourages reasonable accommodation to correct religious discrimination but denies governmental support which establishes certain beliefs over others, has already been established by this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) and the Decision and Order of the Commissioner of the NYSDHR herein, as affirmed by the New York courts, is contrary to such standard.

Not only must there be a uniform national standard applied to employees as to their religious belief, there must also be a uniform national labor policy under the federal labor laws if collective bargaining agreements are to remain viable and effective. The Decision and Order of the Commissioner of the NYSDHR herein totally ignores this concept.

Finally, the application of the substantial evidence test to the constitutional issues raised constitutes a denial of due process of law since the Petitioner has not received a review concerning the merits of the discrimination claim.

I. The First Amendment Issue

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) [hereinafter "*Hardison*"], this Court did not reach the issue of whether requiring an employer to make more than reasonable efforts to accommodate an employee's sabbath beliefs violated the Establishment Clause of the First Amendment of the United States Constitution. The Court was able to avoid passing on this issue only because it held that the statute involved could not require more than reasonable accommodation. However, Section 296.10 of the Executive Law of the State of New York as applied in the present case, rejects the rule of reasonable accommodation and requires far more, namely, virtually absolute accommodation. Thus, the establishment issue is clearly present here.

The Court in *Hardison* was well aware of the serious constitutional problem which would be raised by requiring more than reasonable accommodation. As Justice White noted: "the District Court voiced concern that if it did not find undue economic hardship in such circumstances, accommodation . . . might . . . raise significant questions . . . under the Establishment Clause." *Id.* at 69-70, n.4. Other courts have held laws prohibiting discrimination against Sabbatarians constitutional only where they required no more than reasonable accommodation. *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976); *American Motors Corp. v. Department of In-*

dustry, Labor and Human Relations, 21 FEP Cases 654 (Wis. Ct. App. 1979); *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 157 Cal.Rptr. 907, 593 P.2d 852 (1979), *appeal dismissed*, 444 U.S. 986 (1979).

The NYSDHR, however, specifically refused to apply *Hardison* in the present case. As the Commissioner stated:

> Respondents argue that the United States Supreme Court's decision in the matter of *Hardison v. Trans World Airlines*, 432 U.S. 63 1977) (sic) concerning Sabbath observance is controlling upon this proceeding. I do not agree. It would appear that the *Hardison* decision was decided under Title VII of the federal Civil Rights Act of 1964 (citation omitted), a general statute without specific reference to Sabbath observance. That statute also insulates, by specific provision, bona fide seniority rights created by collective bargaining agreements, and such seniority rights were a factor in the Hardison case, (citation omitted). The New York law contains no such insulating provision. Moreover . . . Complainant's seniority as compared to other employees was never presented as an issue. (App. C, pp. 53 and 54).

Hardison, however, hardly has such a narrow scope and trivial meaning. The Court in *Hardison* held that "reasonable accommodation" did not require an employer to take any action which gave a preference to particular religious beliefs. To require more would create a serious establishment problem.

In the Court of Appeals for the Eighth Circuit, Hardison had successfully argued that "reasonable accommodation" meant that his religious needs should take precedence over the collective bargaining agreement which allocated days-off according to seniority and the preference of other employees who desired Saturdays off.

However, in reversing that decision, this Court held that an employer could not deny the "shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Id.* at 81.

The Court of Appeals for the Eighth Circuit also held that the employer had failed to consider two other reasonable means of accommodation. The employer could have allowed Hardison to work a four day week and used someone working elsewhere in the company on Saturdays to perform Hardison's work. Alternatively, the employer could have used one of its weekday employees to substitute for Hardison on Saturday, even though this would have involved paying premium wages. But, this Court held that both alternatives were unreasonable because they preferred particular religious beliefs:

> Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages.
>
> * * *
>
> [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they would want would *involve unequal treatment of employees* on the *basis of their religion*. *Id.* at 84. (Emphasis added).

Hardison, then, stands for the rule that an employer cannot be compelled to violate a collective bargaining agreement, require another employee to substitute involuntarily, or incur any cost in efficiency or dollars, which is more than *de minimus*, in order to accommodate Sabbatarian beliefs because this "would involve unequal treatment of employees on the basis of their religion." *Id.* By rejecting the rule that only reasonable accom-

modation which does not give a preference to particular religious beliefs can be required of an employer, the NYSDHR clearly crossed the constitutional boundary. To require more than reasonable accommodation creates an establishment of religion.

Nor is there any doubt that the NYSDHR went far beyond the limit of reasonable accommodation. The first part of *Hardison* is devoted to specifying what constitutes reasonable accommodation. This Court held that "TWA made reasonable effort to accommodate" when it took the following acts: meetings with the plaintiff to find a solution, accommodating the plaintiff's observance of his special religious holidays (other than Saturdays), authorizing the union steward to search for someone who would swap shifts and attempting unsuccessfully to find the plaintiff another job.

Carnation's efforts at accommodation were far more extensive in degree and duration. They included:

> (a) switching Clarke's days off in a manner not in keeping with the established work practice so that he could continue in the Labeler Operator position;
>
> (b) permitting Clarke to enter into a voluntary arrangement with his two fellow Labeler Operators whereby they would substitute for him on Saturdays;
>
> (c) locating and offering to Clarke an alternate position in the General Labor Classification that did not involve Saturday work;
>
> (d) making arrangements for personnel changes so that Clarke could advance from the General Labor Classification to the higher paying position of Warehouseman and rearranging his work schedule so as to eliminate shift and Saturday work in his position;

(e) continuously canvassing other employees in an effort to find a volunteer to substitute for Clarke on Saturdays so that he could qualify for the Labeler Operator position; .

(f) requesting the union to waive the rotation requirement under the collective bargaining agreement;

(g) engaging in conferences with Clarke and the Union in an effort to resolve the problem, and

(h) meeting with representatives of Clarke's church in a further effort to accommodate his religious beliefs.

The NYSDHR dismissed these efforts as inadequate without any comment. Nevertheless, the NYSDHR's opinion does discuss one of the types of actions held to be reasonable in *Hardison*. There the employer's unsuccessful effort to find the plaintiff a job was considered reasonable accommodation. Here Carnation actually succeeded in finding Clarke another job, although at slightly lower pay, which allowed him to observe his Sabbath. It is important to note that at this point Carnation had exhausted all other reasonable means of keeping Clarke in the higher paying Labeler's job. As the findings of the NYSDHR indicate, Carnation allowed "the two other Labeler Operators [to cover] for Complainant on a temporary basis on Saturdays"; found a substitute for Frank Wilson who filed a "union 'grievance' " because "he was not receiving his Saturday's off on the rotating basis" stated in the collective bargaining agreement; and arranged for the two other Labelers to work in Clarke's place on Saturdays for almost two years, until "they informed Respondent they would no longer work on Saturdays in place of Complainant", (App. C, p. 46).

The NYSDHR did not recognize the reasonableness of the acts involved here, even though *Hardison* held such acts to be reasonable. Meetings with Clarke, the union and others, authorizing the union to search for volunteers to work in Clarke's place and not only seeking but finding Clarke another job, all constituted reasonable accommodation. Moreover, the NYSDHR failed to recognize that violating Wilson's preference and his collective bargaining agreement rights to have certain Saturday's off went beyond reasonable accommodation and created a preference for particular religious beliefs. An employer cannot "deny the shift and job preferences of some employees, and deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 81.

The other relevant findings of the NYSDHR also clearly go beyond the requirement of reasonable accommodation to create religious preference. *Hardison* held that where a union was unwilling to vary the terms of the agreement, an employer could not be compelled to "unilaterally arrange for a swap [since this] would have amounted to a breach of the collective bargaining agreement" and as demonstrated above, a religious preference. *Id.* at 79. The NYSDHR held that despite the lack of trained volunteers (App. C, p. 46) and the grievance of Frank Wilson (App. C, pp. 45 and 46), Carnation could be compelled to violate the relief days rotation provision of the union agreement and unilaterally arrange for other employees to substitute for Clarke, so that he could return to the Labeler position (App. C, p. 48).

Hardison also held that requiring an employer to bear more than *de minimus* inefficiency or costs to accom-

modate one employee "when no such costs are incurred to give other employees the days off they want would involve unequal treatment on the basis of their religion." *Id.* at 84. Carnation advised Clarke that to allow him to work as a Labeler and have Saturday off, it would have to hire a fourth Labeler but that it was " 'not economical to pay an employee for 40 hours per week at Bracket I pay and only receive 8 hours of Bracket I work.' " (App. C, pp. 46 and 47). The NYSDHR, however, invented the alternative of having an employee in a lower pay grade work four days a week in his regular job and substitute for Clarke as a Labeler on Saturdays, but this would involve exactly what *Hardison* found objectionable, that is, it would leave another job uncovered and cause inefficiency due to a lack of a trained replacement. Also contrary to *Hardison*, the NYSDHR held that Carnation, without consulting the union, could interpret the collective bargaining agreement to avoid paying the substitute at the higher rate of pay for working as a Labeler on Saturdays. Adding either extra cost or "compelling another employee to work involuntarily in [Clarke's] place," according to *Hardison*, involves allocating the privilege of having Saturdays off . . . according to religious beliefs." *Id.* at 85.

Thus, it is abundantly clear that the NYSDHR repeatedly demanded that Carnation perform acts of accommodation which *Hardison* held to be unreasonable and to "involve unequal treatment of employees on the basis of their religion." *Id.* at 84.

The test for determining whether governmental assistance constitutes establishment of religion was laid down in *Committee for Public Education and Religion v. Nyquist*, 413 U.S. 756, 772-773 (1973) [hereinafter

"*Nyquist*"] and *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) and, more recently, reiterated in *Meek v. Pittenger*, 421 U.S. 349, 358 (1975). As the Court in *Nyquist* stated:

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and third, must avoid excessive governmental entanglement with religion. . . . 413 U.S. at 773.

The New York State Executive Law, in relevant part, states that its purpose is "to eliminate and prevent discrimination in employment." N.Y. Exec. Law, §290 (McKinney, 1982). Section 296.10(a) of the Executive Law goes on to make it unlawful "to discriminate against any person in obtaining or holding employment, because of his observance of any particular . . . sabbath . . . ." Section 296.10(c) creates an exception (where the uniform application of terms and conditions of attendance is *essential* to prevent undue economic hardship to the employer." (Emphasis added). N.Y. Exec. Law §296.10(a)(c) (McKinney, 1982).

While it might be argued in the abstract that the elimination of religious discrimination in employment is a legitimate secular purpose, the language and application of Section 296.10(c) reveal a different purpose. The language of that section states that unless it is "essential" to prevent undue economic hardship, an employer must accommodate particular sabbath beliefs. As applied, Section 296.10(c) goes even farther. Repeatedly, as demonstrated above, the NYSDHR has required Carnation to take actions which are highly unreasonable and very preferential to particular religious beliefs. A secular

purpose of ending discrimination would strike an even balance between competing, legitimate needs and not compel employers and employees to clearly subordinate their legitimate needs and values to another's religious preference. Such subordination is not a "clearly secular legislative purpose." *Committee for Public Education and Religion v. Nyquist*, 413 U.S. at 773.

It is also abundantly clear that the present statute as applied here does not have "a primary effect which neither advances nor inhibits religion." *Id.* As Judge Celebrezze pointed out in his dissenting opinion in *Cummins v. Parker Seal Co., supra*:

> First, the religious accommodation requirement discriminates between religion and non-religion. Only those with "religious practices" may benefit from the rule. . . .
>
> Second, it discriminates among religions. Only those which require their followers to manifest their beliefs in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employee's accommodation. 516 F.2d at 558.

It is important to distinguish the accommodation or preference of religious beliefs required by the NYSDHR from reasonable acts of accommodation. Statutes and applications which require only reasonable accommodation may only provide the kind of incidental benefit to religion which has been found constitutional. *Meek v. Pittenger, supra.* It is far more difficult to justify the constitutionality of unreasonable accommodation which rather than merely redressing discrimination actually creates a preference for particular religious beliefs over other religions and other important non-religious values.

Finally, the statute as applied here does not "avoid excessive government entanglement with religion", as required under *Nyquist*, 413 U.S. at 773. As Judge Celebrezze in *Cummins v. Parker Seal Co., supra*, pointed out:

> Disposition of complaints . . . will require inquiry into the sincerity with which beliefs are held and force consideration of the nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters. 516 F.2d at 559.

Again, reasonable accommodation might not cause excessive entanglement because it would be self-policing. In the present case, the enormous sacrifices being required of the employer and other employees can be expected to produce continuing conflicts among various parties, all calling for governmental involvement.

For all of the foregoing reasons, it is clear that the kind of unreasonable accommodation required by the present statute as applied creates an establishment of religion. Therefore, it is respectfully requested that this Petition be granted to address this important question which presently remains unresolved.

II. The Federal Labor Law Issue

The collective bargaining agreement between Carnation and Local No. 649 by which Clarke was covered during all of the relevant time periods herein provided that the normal work week would be five days, Monday through Sunday, consisting of forty hours per week. It further provided for the rotation of relief days and for a system of seniority. Notwithstanding these provisions, Carnation in 1971 unilaterally changed Clarke's work schedule so as to give him his sabbath off contrary to the established work rule and collective bargaining provisions. As a

result the grievance of Frank K. Wilson was filed and upheld and Carnation was thereafter required to comply with the "rotation" provisions of the collective bargaining agreement.

The alternatives open to Carnation to accommodate Clarke, other than the one it chose, would be in violation of the neutral rotation system and seniority system in the collective bargaining agreement. If it decided to compel the other two Labeler Operators to rotate weekends every other week rather than every third week, it would clearly have violated the neutrality of the rotation and seniority system, and would be liable for breach of contract for such violation. Yet this is precisely what the NYSDHR has ordered Carnation to do. In his decision, the Commissioner stated:

> Respondents further contend that to grant Complainant the relief he seeks would cause a significant risk to industrial peace, since the bargaining agreements, as relating to rotation of relief days, . . . would be violated thereby causing the filing of employee grievances . . . . Based on the evidence in this record I agree with Complainant's contention that Respondent Carnation has the flexibility, within its collective bargaining agreement with the necessary party local (649) to place Complainant in the Labeler's position and allow him to observe his Sabbath . . . The possibility of adverse employee reaction is not a statutory exception that Respondent can rely upon as justification for its failure to comply with the Human Rights Law. (App. C, pp. 52 and 53).

It is respectfully submitted that in light of the clarification of federal law contained in *Hardison*, a New York State court is preempted by federal law from rendering a judgment in their case which might interfere with the valid and binding collective bargaining agreement in force between Carnation and the union.

The opinion in the *Hardison* case emphasized that an otherwise valid collective bargaining agreement need not be violated by an employer in order to accommodate an employee's religious beliefs. The Court stressed that collective bargaining lies at the core of our national labor policy and that the most explicit legislative direction is required in order for any court to embark on a course which might tend to undermine the role of the collective bargaining agreement, the recognized keystone of industrial peace.

The Constitution of the United States, Article VI, Clause 2, provides that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding". It is well settled that any state activity that creates a substantial risk of conflict with policy central to the Federal Labor Law is preempted and barred. *Connell Construction Co. v. Plumbers and Steam Fitters Local Union No. 100*, 421 U.S. 616, 636 (1975).

The opinion of this Court in *Local 24, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, AFL-CIO v. Oliver*, 358 U.S. 283 (1959) [hereinafter "*Oliver*"] is instructive. In that case, the State of Ohio had attempted to enforce its antitrust law against certain common carriers and a local union, so as to enjoin them from carrying out their collective bargaining agreement. This Court held that since the provision found to be offensive under Ohio law was part of an agreement resulting from the exercise of collective bargaining rights under federal labor law, and since that provision was one as to which federal law directed the

parties to bargain, the state could not apply its antitrust law to prevent the parties from carrying out the terms of the agreement. The Court noted that the goal of the federal policy was to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. As the Court stated:

> To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. [Citations omitted]. 358 U.S. at 295-6.

The provisions in a collective bargaining agreement with respect to seniority, rotation of shifts and hours of work are no less mandatory subjects of bargaining than the compensation clause at issue in the *Oliver* case. See also *Trans World Airlines v. Hardison, supra; Oneita Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967). In-

deed, the Court specifically stated in *Hardison* that "allocating the burdens of weekend work was a matter for collective bargaining". 432 U.S. at 80. Clearly, Section 296.10 of the Executive Law cannot be construed to require an employer to discriminate against some employees by mandating weekend work in order to enable others to observe their sabbath. Such a practice would most certainly constitute unequal application of the agreement among employees and would create chaotic personnel problems and lead to grievances and additional arbitrations. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330 (6th Cir. 1970). It must be emphasized that the issue of grievances or employee unrest is not speculative. Rather, a grievance was filed by Frank Wilson and Blair & Clark served notice in writing that they would no longer work on weekends on which they were entitled to be off.

The opinion of the Court in *Hardison* forms an important addition to the body of law relating to collective bargaining agreements and constitutes a compelling reason for this Court to examine the question of federal preemption as it relates to this Petition.

For the reasons stated above, the Petition should be granted.

III. The Due Process—Review Issue

Under Section 298 of the New York Executive Law, the findings of fact and orders of the NYSDHR "shall be conclusive if supported by sufficient evidence on the record considered as a whole". N.Y. Exec. Law §298 (McKinney, 1982). In affirming the decision of the Commissioner, the New York State Supreme Court, Appellate Division, Fourth Judicial Department was limited to find-

ing that the agency's conclusion was a reasonable one. It had no power "to find new facts or take a different view of the weight of the evidence if the [NYSDHR's] determination [was] supported by substantial evidence". *State Division of Human Rights v. Columbia University*, 39 N.Y.2d 612, 616, 350 N.E.2d 396, 398 (1976), *cert. denied sub nom. Gilinsky v. Columbia University*, 429 U.S. 1096 (1977). Accordingly the appellate court made no finding concerning the merits of the discrimination claim herein, notwithstanding its previous decision of no discrimination, and effectively denied Carnation its right to due process of law. See *State Division of Human Rights v. Carnation*, 53 A.D.2d 1053, 385 N.Y.S.2d 888 (4th Dep't. 1976).

Had the appellate court not been so limited, it would have been clear that there is simply no proof to support the NYSDHR's finding that Carnation violated Section 296.10(a) "by demoting [Clarke] to the lower paying job in August, 1973 and preventing him from continuing in his position as Labeler from that time to the present" (App. C, p. 48). That finding, standing alone, does not justify the inference drawn by the Commissioner that this offer of alternative employment was an act of discrimination. On the contrary, all of the evidence presented at the hearing established that Carnation made every reasonable effort to accommodate Clarke. Indeed, as the uncontradicted testimony of Gary Jordan established, this "lower paying job" was the *only* job available at the time which did not require working on Clarke's sabbath and was offered to Clarke only after all other efforts to keep him in the higher paying job failed (which had been successful for more than two years).

Moreover, the Commissioner's other findings conclusively establish that Carnation resolved a union grievance by Frank Wilson that he was being denied his Saturdays and Sundays off because Clarke would not work on his sabbath by "using David Weaver . . . to fill in for Mr. Wilson", which allowed Clarke to remain in the Labeler Operator position for almost two years (App. C, pp. 45 and 46). The Commissioner also found that the other two Labeler Operators "informed [Carnation] that they would no longer work on Saturdays in place of Complainant" leaving no qualified substitutes to fill in for Clarke in the Labeler Operator position (App. C, p. 46). The record further establishes that Clarke was moved from the Bracket III general labor job to the Bracket II job of warehouseman. In performing this job, which involved Saturday work, the Commissioner found that Carnation had obtained a substitute. "Carnation has, since September 16, 1976, been substituting another person to work in Complainant's place on those Saturdays when he would, normally under the rotating system, have been scheduled to work." (App. C, p. 48). Therefore, it is submitted that the Commissioner in his very own decision has found that Carnation accommodated Clarke in his employment and in carrying out his religious convictions.

Accordingly, it is respectfully requested that the writ be granted because in applying the substantial evidence test, the Court below has denied Carnation its right to due process by denying it a review on the merits of the claim. See *Kremer v. Chemical Construction Corp.*, 72 L.Ed.2d 262 (1982) (dissenting opinion). Had the court below reviewed the record as a whole and the reasonable, probative and logical evidence contained therein, it would have been clear that there is no substantial evidence, let

alone any evidence that Carnation discriminated against Clarke in violation of Section 296.10(a) of the Executive Law. Rather, it would have found that Carnation's acts of accommodation far exceeded the level of reasonable accommodation set forth in *Trans World Airlines, Inc. v. Hardison, supra.* See also *Brener v. Diagnostic Center Hospital,* 671 F.2d 141 (5th Cir. 1982).

Conclusion

For all of the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

VICTOR T. FUZAK
(Counsel of Record)
H. KENNETH SCHROEDER, JR.
ANNE S. SIMET
HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR
1800 One M & T Plaza
Buffalo, New York 14203
(716) 856-4000
and
PAUL ANTHONY BURNHAM, *of Counsel*
Carnation Company
5045 Wilshire Boulevard
Los Angeles, California 90036

Attorneys for Petitioner